IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FOTOMEDIA TECHNOLOGIES, LLC	§	
	§	
Plaintiff,	§	Case No. 2:07-CV-255-TJW
	§	
v.	§	Judge: Honorable T. John Ward
	§	
AOL LLC, AMERICA ONLINE, INC., PHOTOBUCKET.COM, INC., SHUTTERFLY, INC., CNET NETWORKS, INC., AND YAHOO! INC.,	§ § § § §	**JURY TRIAL DEMANDED** **MOTION OPPOSED**
	§	
Defendants.	§	

PHOTOBUCKET INC.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT, AND MOTION TO STRIKE; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Defendant Photobucket.com, Inc. (“Photobucket”) moves, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss FotoMedia Technologies LLC's (“FotoMedia”) Complaint for failure to state a claim for which relief can be granted, or alternatively, for a more definite statement pursuant to Fed. Rule of Civ. P. 12(e). In addition, Photobucket requests that, pursuant to Fed. Rule of Civ. P. 12(f), should its motion be granted, the Court strike sections (A), (B), (D), and any other sections of the prayer for relief which set forth requests based upon claims that have been dismissed.

I. SUMMARY OF ARGUMENT

FotoMedia's complaint fails to plead sufficient facts to support its claim of patent infringement under the United States Supreme Court's recent decision in *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007). In *Bell Atlantic*, the Supreme Court tightened the pleading requirements under Fed. Rule of Civ. P. 8(a) by holding that the formulaic recitation of the

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elements of a claim is insufficient under Rule 8. Instead, a plaintiff must allege sufficient facts to raise the claim above the speculative level.

FotoMedia's Complaint does not meet the *Bell Atlantic* standard. Indeed, the Complaint alleges virtually no facts beyond the existence of a number of websites, and the parties are left to guess how the websites are alleged to infringe FotoMedia's patents. With respect to its willfulness and indirect infringement allegations, the complaint does not even recite the elements of those aspects of the claim. Under recent Federal Circuit precedent, willfulness and induced infringement claims require knowledge of the risk of infringement and a culpable state of mind, respectively. No such pleading exists. For indirect infringement to be actionable, direct infringers must exist. None are pled. Because of these substantial pleading failures, dismissal of FotoMedia's Complaint or an order for a more definite statement is appropriate. Furthermore, without such allegations, the plaintiff is not entitled to the relief it requests in its prayer for relief.

II. BACKGROUND

FotoMedia sued Photobucket, along with four other companies alleged to operate six different “photosharing” websites. The Complaint alleged infringement of three patents (the “Patents-in-Suit”). Complaint ¶¶ 20-31. The Complaint merely identified the websites by their Uniform Resource Locator ("URL") and describes nothing about the websites other than to say they are for “photosharing.” *Id.* ¶¶ 14-18. Each count asserts infringement against all of the websites. *See id.* ¶¶ 21, 25, 29. The totality of the allegation of infringement for each count is substantively identical. Compare *id.* ¶ 21 with ¶¶ 25, 29. Specifically, the Complaint alleges that the Defendants:

> [H]ave been and are now directly infringing, and indirectly infringing by way of inducing infringement and/or contributing to the infringement of, the [] patent in the State of Texas, in this judicial district, and elsewhere within the United States by, among other things, making, using, licensing, selling, offering for sale, or

> importing photosharing web site services alone or in combination with personal computers, as well as related services covered by one or more claims of the [] patent, all to the injury of FotoMedia.

See id., ¶¶ 21, 25, 29. The Complaint further alleges that the Defendants' "acts of infringement have been willful, deliberate, and in reckless disregard of FotoMedia's patent rights, and will continue unless permanently enjoined by this Court." *See id.* at ¶¶ 22, 26, 30. These form allegations, together with an exhibit attaching the three Patents-in-Suit, represent the entirety of the allegations of infringement made by FotoMedia.

Based upon these spartan allegations, FotoMedia seeks: (1) judgment that Defendants have caused indirect infringement, (2) a permanent injunction enjoining Defendants (and many others) from engaging in indirect infringement, and (3) a finding of willful infringement and (4) a trebling of the amount of damages and losses. *See* Complaint, Prayer for Relief ¶¶ A, B, and D.

III. ANALYSIS

A. *Bell Atlantic* Requires Fact-Based Pleading.

FotoMedia's allegation of infringement falls short of the minimum pleading standard recently articulated in *Bell Atlantic*. A complaint that complies with Fed. R. Civ. P. 8(a) must contain enough factual matter, taken as true, to suggest that the elements of the claim are met. *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007). "When the allegations in a complaint, however true, could not raise a claim or entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *See id.* at 1966 (citations omitted). To proceed with a claim, the complaint must contain enough facts to state a claim for relief that is plausible on its face. *See id.* at 1964-65. A mere formulaic recitation of the elements of a cause of action does not satisfy this standard. *Id.* at 1965. Rather, the plaintiff must provide a "showing" rather than a blanket assertion. *Id.* at n.3. If the allegations are insufficient, the Court may properly dismiss the claim. *See id.* at 1974. The *Bell Atlantic* standard has been found to apply to patent infringement disputes where the pleadings are conclusory. *Anticancer, Inc. v. Xenogen Corp.*, No. 05-CV-0448, 2007 U.S. Dist. LEXIS 59811 (S.D. Cal. Aug. 13, 2007) (dismissing complaint for direct and indirect patent infringement under *Bell Atlantic* when complainant fails to plead sufficient facts to demonstrate a plausible entitlement to relief). *See also Halo Elecs. v. Bel Fuse, Inc.*, No. 2:07-CV-00331, 2007 WL 2156332 (D. Nev. July 26, 2007) (not citing to *Bell Atlantic* but nevertheless finding conclusory allegation of infringement insufficient).

B. FotoMedia Has Not Pled Facts Showing Willful Infringement

FotoMedia has fallen far short of the *Bell Atlantic* standard in asserting willful infringement. Rather than alleging facts that show that the risk of infringement was known to Photobucket before FotoMedia filed suit, FotoMedia relies only upon the bare bones allegation that Photobucket has been “willful, deliberate, and in reckless disregard of” FotoMedia's patent rights. Such pleading is an example of Fotomedia’s use of a “formulaic recitation of claim elements,” which is insufficient under *Bell Atlantic*. Without factual allegations that rise above a merely speculative level, plaintiff has not met the pleading standard.

FotoMedia also fails to allege the basic elements of willful infringement. Under the recent *en banc* Federal Circuit case of *In re Seagate Tech., LLC,* No. 06-M830, slip op. at 12 (Fed. Cir. Aug. 20, 2007) (*en banc*), a plaintiff must show that the infringer acted despite an “objectively high likelihood that its actions constituted infringement of a valid patent.” Mere negligence it not enough – a defendant must plead facts to support a “reckless disregard” of plaintiff’s patents. *See id.* at 10. For a defendant's behavior to rise to the level of “reckless disregard,” *the risk of infringement* must be “known or so obvious that it should have been known to the accused infringer.” *Id.* at 12.

FotoMedia's allegations offer no facts to establish an "objectively high likelihood that" Photobucket's actions constituted infringement and offers no facts to show a "reckless disregard" of FotoMedia's patents. Furthermore, FotoMedia's allegations fail to recite any facts that *the risk of infringement* was "known or so obvious that it should have been known to the accused infringer." In fact, FotoMedia has not even alleged that Defendants were aware of the Patents-in-Suit before the filing of this lawsuit. *See In re Seagate Tech.*, at 12 ("A willfulness claim asserted in the original complaint must necessarily be grounded exclusively in the accused infringer's pre-filing conduct."). When a complaint alleging willful infringement fails to include an allegation that defendant had knowledge of the patents-in-suit, the claim should be dismissed. *See Nichia Corp. v. Seoul Semiconductor Ltd.*, No. C-06-0162, 2006 WL 1233148, at *2 (N.D. Cal. May 9, 2006). *See also Mitutoyo Corp. v. Cent. Purchasing, LLC,* No. 2006-1312, 1343, slip op. (Fed. Cir. Sept. 5, 2007) (holding that willfulness claim may be properly pled when plaintiff alleged that the acts of infringement occurred with full knowledge of the patent before litigation ensued and pled some facts purporting to show knowledge). The failure to provide specific facts in support of plaintiff's claim of willfulness should result in dismissal or a requirement for a more definite statement.

C. FotoMedia Has Not Pled Facts to Support an Induced Infringement Claim

FotoMedia's attempt to plead an inducement claim is also inadequate. To properly plead inducement, a plaintiff must plead that: (1) the defendant knew of the patent(s) in suit, (2) the defendant knowingly and actively aided and abetted another's direct infringement, (3) the defendant possessed *specific intent* to encourage another's direct infringement, and (4) that the direct infringement which was encouraged actually occurred. *See DSU Med. Corp v. JMS, Co.,* 471 F.3d 1293, 1304-06 (Fed. Cir. 2006) (sitting *en banc* on the inducement issue only). *See also Water Techs Corp. v. Calco, Ltd.*, 850 F.2d 660, 668 (Fed. Cir. 1988); *Ondeo Naclo Co. v.*

EKA Chems., Inc., No. Civ.A. 01-537, 2002 WL 1458853 (D. Del. June 10, 2002) (inducement pleadings that fail to allege direct infringement by someone other than defendant are properly dismissed under Fed. R. Civ. P. 8(a)); *Coolsavings.Com, Inc. v. Catalina Mktg. Corp.*, No. 98 C 6668, 1999 WL 342431, at *2 (N.D. Ill. May 14, 1999) (dismissing complaint without prejudice and granting leave to amend claims of inducing infringement because the complaint “alleges only the ‘bald assertion’ of active inducement, which, ‘without the allegation of any facts supporting it,’ does not satisfy the pleading requirements of the federal rules”).

FotoMedia has failed to plead or allege any of the facts required to support a showing of induced infringement under the standards articulated in *DSU Med. Corp.* and *Bell Atlantic*, and as such, the Court should dismiss any assertion based upon induced infringement. For example, as set forth above, the complaint has no allegation that Photobucket ever knew of the patents-in-suit.

Further, with respect to the intent element, the pleading must present “evidence of culpable conduct, not merely that the inducer had knowledge of the direct infringer’s activities.” *DSU Med. Corp.*, 471 F.3d at 1306. Indeed, "the [alleged] inducer must have an *affirmative intent* to cause direct infringement.” *Id.* (emphasis and bracketed comment added). FotoMedia has not identified any facts showing any culpable conduct on Photobucket's part. *Bell Atl. Corp.*, 127 S.Ct. at 1965 n.3 (“Rule 8(a)(2) still requires a “showing,” rather than a blanket assertion, or entitlement or relief”).

Finally, Fotomedia does not identify what the "encouragement" is that leads to an inference of inducement, nor has it identified any direct infringers. *See Ondeo Naclo Co.,* 2002 WL 1458853 at *2. It merely identifies a URL and uses the term "photosharing." Such pleading is insufficient.

D. FotoMedia has not Pled Facts to Support a Contributory Infringement Claim

FotoMedia has also failed to properly plead a contributory infringement claim. "An accused infringer may be liable for contributory infringement under 35 U.S.C. § 271(c) if the patent holder proves that the defendant made the patented device, that the device has no substantial non-infringing uses, and that the defendant sold the device within the United States to a customer whose use of the device constituted an act of direct infringement." *MGM Well Servs., Inc. v. Mega Lift Sys., LLC*, No. H-05-1634, 2007 U.S. Dist. LEXIS 30536, at * 6 (citing *DSU Med Corp.*, 471 F.3d at 1303). "The patentee always has the burden to show direct infringement for each instance of indirect infringement." *DSU Med. Corp.*, 471 F.3d at 1303. Therefore, a properly pleaded complaint must contain, at a bare minimum, facts to show that: (1) Photobucket makes and sells photosharing web services; (2) Photobucket's alleged photosharing web services have no substantial non-infringing uses; (3) Photobucket made sales of their photosharing web services in the U.S. that contributed to another's direct infringement; and (4) Photobucket's customers' use of their web services in the United Sates constituted an act of infringement. *See id.* FotoMedia makes no such factual allegations. It simply identifies a URL and makes the conclusory statement that Photobucket is "contributing to the infringement of" the Patents-in-Suit. *Bell Atl. Corp.*, 127 S.Ct. at 1965 ("a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than label and conclusions"). FotoMedia's contributory infringement claim offers no facts and does not even rise to a speculative level.

IV. IN THE ALTERNATIVE, THE COURT SHOULD REQUIRE FOTOMEDIA TO AMEND ITS CLAIMS TO PROVIDE A MORE DEFINITE STATEMENT

If the Court does not grant Photobucket's motion to dismiss, Photobucket requests the Court to exercise its discretion and order FotoMedia to amend its Complaint to provide a more definite statement. When a complaint survives a motion to dismiss, a motion for more definite statement under Fed. Rule of Civ. P. 12(e) may still be appropriate. *See, e.g. Agilent Techs., Inc. v. Micromuse, Inc.*, No. 04 Civ. 3090, 2004 WL 2346152 at *4 (S.D.N.Y. Oct. 19, 2004). Rule 12(e) allows a defendant to seek more information when a complaint is vague or ambiguous:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired.

As set forth above, the Complaint is hopelessly vague with respect to its claims of inducement, contributory infringement, and willful infringement because FotoMedia has failed to allege or supply facts that support even the possibility of a claim.

V. SHOULD THE COURT GRANT THE MOTION TO DISMISS, STRIKING PRAYERS FOR RELIEF ASSOCIATED WITH THE CLAIMS IS APPROPRIATE

FotoMedia has requested numerous forms of relief, including declarations related to indirect infringement, permanent injunctions related to indirect infringement, and trebling of damages and losses due to willfulness.[1] As plaintiff's claims of indirect infringement and willfulness are insufficiently pled, the prayers for relief related to them should also be stricken. "A motion to strike may be used to strike any part of the prayer for relief when the damages sought are not recoverable as a matter of law." *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1479 n.34 (C.D. Cal. 1996). When the underlying claims are insufficiently pled, striking the related prayers for relief is appropriate. *See Nichia Corp.*, 2006 WL 1233148 at *2.

VI. CONCLUSION

FotoMedia has not properly pled its claims for inducement, contributory infringement, and willful infringement under the standards recently articulated by the United States Supreme

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[1] To the extent that plaintiff is seeking an exceptional case finding based upon indirect infringement and/or

Court and the Federal Circuit. As a result, the Court should dismiss those claims and strike the related prayers for relief.

Dates: September 7, 2007

Respectfully submitted,

GILLAM & SMITH, LLP

/s/

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willfulness, the request for attorneys fees in paragraph (E) of the prayer for relief should also be stricken.

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that counsel for Defendants and counsel for Plaintiff conferred on September 5, 2007 and Plaintiff does oppose this motion.

/s/
Harry L. Gillam, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this motion was served on all counsel who have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on this 7th day of September, 2007.

/s/
Harry L. Gillam, Jr.